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**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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*Federal Communications Commission
Office of Secretary*

In the Matter of

Amendment of the Commission's Rules To
Permit Flexible Service Offerings in the
Commercial Mobile Radio Services

WT Docket No. 96-6

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COMMENTS OF SPRINT SPECTRUM L.P. d/b/a SPRINT PCS

Pursuant to the Further Notice of Proposed Rulemaking released by the Federal Communications Commission ("FCC" or "Commission") on August 1, 1996 in the above-captioned proceeding,¹ Sprint Spectrum L.P., d/b/a Sprint PCS ("Sprint PCS") submits the following comments.

I. INTRODUCTION

The Commission seeks comment on the appropriate regulatory treatment of fixed services offered by commercial mobile radio service ("CMRS") licensees. Specifically, the Commission proposes to establish a rebuttable presumption that "any wireless service provided under a CMRS provider's license would be considered to come within the definition of CMRS and consequently regulated as CMRS."² The Commission apparently would allow, however, any interested party to challenge, at any time, that presumption.

¹ See *Amendment of the Commission's Rules To Permit Flexible Service Offerings in the Commercial Mobile Radio Services*, First Report and Order (the "Order") and Further Notice of Proposed Rulemaking ("FNPRM"), 11 FCC Rcd 8965 (1996).

² *FNPRM*, 11 FCC Rcd at 8987.

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This approach would create regulatory uncertainty, deter CMRS providers from developing flexible advanced services in response to consumer demand and create an unnecessarily complex CMRS regulatory framework.

Given the nascent state of wireless local loop services, all commercial service offerings by CMRS providers, both fixed and mobile, should be regulated as CMRS under the regulatory forbearance structure the Commission properly has established for those services. CMRS providers do not possess market power with respect to fixed services, and as such, do not pose a competitive threat that would justify increased regulatory oversight. The record in this proceeding provides no evidence to the contrary. Unless and until CMRS licensees demonstrate market power in the fixed wireless loop market, the Commission should take no further regulatory action. Even the establishment of a favorable presumption represents unnecessary and inefficient regulation.

Moreover, as the Commission has recognized,³ Section 332(c)(3) of the Communications Act of 1934, as amended, (the “Act”) provides a mechanism for determining when a fixed offering by a CMRS provider could be subject to more stringent regulation. Under this provision, if a state can demonstrate satisfactorily to the FCC that a fixed wireless service within its jurisdiction “is a replacement for land line telephone exchange service for a substantial portion of the telephone land line exchange service within such state,” and/or that market conditions fail to protect subscribers from unjust or unreasonable rates,⁴ the Commission then can assess whether additional regulatory oversight is necessary. Until such time, however, the Commission should not increase the regulatory burden on the flexible services that it correctly has determined CMRS providers should be allowed to offer.

³ *Id.* at 8988-89. (Citing the Comments of AT&T, BellSouth, and GCI to the original NPRM in this proceeding).

⁴ *See* 47 U.S.C. § 332(c)(3)(A).

II. FIXED APPLICATIONS OF CMRS SPECTRUM SHOULD BE REGULATED AS CMRS

Absent a state showing that it should be permitted to regulate fixed services offered by CMRS licensees, such services should be subject to the same carefully-fashioned scheme of forbearance regulation that the Commission applies to mobile CMRS offerings. Congress has given the Commission a specific mandate to encourage the growth of new technologies.⁵ When Congress amended Section 332 of the Act to specify competitive bidding for CMRS licensing and establish regulatory parity in CMRS services, it sought to promote growth and competition in the industry and to ensure that economic forces rather than regulatory pressures spur the development of advanced CMRS services.⁶ As one of its responses to this mandate the Commission appropriately decided to permit CMRS licensees to provide any fixed service.⁷ Sprint PCS applauds this decision as an important step in the Commission's ongoing efforts to align its policies and procedures with the competitive realities of today's CMRS marketplace and to ensure that unnecessary regulation does not stifle competitive innovation.

A. CMRS Provision Of Wireless Local Loop Services Does Not Require Additional Regulatory Safeguards

The Commission consistently has found that common carrier regulation should be imposed only on service providers with the power to control price and output in the relevant market,⁸ *i.e.*, those that possess market power. The FNPRM proposes a regulatory scheme

⁵ See *e.g.*, 47 U.S.C. § 157(a) ("It shall be the policy of the United States to encourage the provision of new technologies and services to the public.")

⁶ See *Amendment of the Commission's Rules to Permit Flexible Service Offerings in the Commercial Mobile Radio Services*, 11 FCC Rcd at 2445, 2449 (1996) ("NPRM").

⁷ *Order*, 11 FCC Rcd at 8977.

⁸ See *e.g.*, *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, 85 FCC 2d 1, 6 (1980); *Amendment of*

(Footnote continues on following page.)

for CMRS-provided fixed services that potentially could discourage the innovation it sought to achieve by increasing unnecessarily the regulatory burden on these new services. CMRS providers, and certainly personal communications service ("PCS") providers, do not possess market power as a general matter, much less with respect to fixed services, a market most have yet to enter.

A CMRS carrier that initiates fixed wireless services begins with zero market share and faces competition not only from the incumbent local exchange carriers ("LECs") and competitive local exchange carriers ("CLECs"), but also potential competition from other CMRS licensees. Moreover, CMRS licensees do not possess or control bottleneck facilities, and thus, they have no ability to impose entry barriers on other competitors. Under these circumstances, there is no prospect that CMRS licensees can engage in successful price discrimination or other anticompetitive activity, or that they can compete with established carriers without offering competitive prices. Thus, there is simply no need for the Commission to depart from its deregulatory policies and unnecessarily and prematurely increase its oversight over potential new offerings from the CMRS industry.

Moreover, the Commission has noted in the past that regulation that is not required as a corrective to market power is likely to be inefficient and anticompetitive.⁹ In deciding to permit CMRS providers the flexibility to offer fixed services, it stated that

(Footnote continued from previous page)

Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), Final Decision, 77 FCC 2d 384, 388-89 ("Computer II Order"), modified on recon., 84 FCC 2d 50 (1980), further modified, 88 FCC 2d 512 (1981), *aff'd sub nom. Computer Communications Industry Ass'n v. Fed. Communications Commission*, 693 F.2d 198 (D.C. Cir. 1982), cert. denied, 461 U.S. 938 (1983), *aff'd on second recon.*, 56 Rad. Reg. 2 (P&F) 301 (May 4, 1984).

⁹ See *Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services, First Report and Order*, CC Docket No. 94-54, FCC 96-263, at ¶14 (July 12, 1996).

In light of the dynamic, evolving nature of the wireless industry, we are concerned that regulatory restrictions on use of the spectrum could impede carriers from anticipating what services customers most need, and could result in inefficient spectrum use and reduced technological innovation.¹⁰

Sprint PCS submits that these concerns apply equally to the question of the proper regulatory treatment of advanced wireless fixed services. Commission forbearance of Title II regulation of fixed services offered by CMRS providers will help to ensure that it attains its laudable goals for fixed CMRS services, *i.e.*, “more flexible responses to consumer demand, a greater diversity of services and combinations of services, and increased competition.”¹¹

B. Section 332(c)(3) Of The Act Provides An Effective And Sufficient Mechanism For Determining Any Required Regulatory Treatment Of Fixed Services Offered On CMRS Spectrum

As an alternative to the imposition of a rebuttable presumption, the Commission seeks comment on the recommendation of a number of parties that the Commission instead rely on the state petition process established under Section 332(c)(3) of the Act to trigger consideration of the regulatory treatment of CMRS fixed services.¹² Sprint PCS supports this approach.

Section 332(c)(3) permits state rate and entry regulation of CMRS providers if a state can demonstrate that market conditions require regulation to protect the public or that such market conditions exist and such services are a replacement for land line service for a

¹⁰ *Order*, 11 FCC Rcd at 8975-76.

¹¹ *Id.*

¹² *See FNPRM*, at 8988-8989 (discussing proposals of AT&T, GCI, and BellSouth).

substantial portion of the telephone land line exchange service within the state.¹³ Sprint PCS urges the Commission to find that this mechanism is wholly sufficient to protect the public interest and to avoid adding unnecessary regulatory layers on CMRS providers.

The Commission should apply a high standard, however, to any state's request to assert jurisdiction over CMRS provision of fixed wireless services. The factors suggested in the FNPRM¹⁴ in assessing the appropriate regulation for CMRS fixed services may be helpful in determining whether market conditions for the services require state regulation to protect consumers. But in analyzing whether the wireless fixed services are truly replacements for land line local exchange service as required by the Act,¹⁵ an assessment of whether a CMRS provider has acquired market power in the provision of fixed wireless local loop services should be the determining significant factor.

In denying a State of California petition to retain regulatory authority over CMRS, the Commission noted that

Congress delineated its preference for allowing this emerging market to develop *subject to only as much regulation for which the Commission and the states could demonstrate a clear-cut need*. . . . Congress intended to promote rapid deployment of a wireless telecommunications infrastructure. Robust investment is a prerequisite to achieving that goal. Thus, in implementing the statute, we have attempted to

¹³ 47 U.S.C. § 332(c)(3). By their very nature, the vast majority of the fixed CMRS services envisioned in this proceeding will be intrastate services. As such, they are most appropriately regulated, if at all, by the various states.

¹⁴ The FNPRM identifies the following possible factors: the relative mobility of mobile stations used in conjunction with the fixed service; whether the fixed service is part of a larger package which includes mobile services or is offered alone; the size of the service area over which the fixed wireless service is provided; the amount of mobile versus fixed traffic over the wireless system; whether the fixed service is offered over a discrete block of spectrum separate from the spectrum used for mobile services; the degree to which fixed and mobile services are integrated; whether customers perceive the service to be fixed; and how the service is marketed. *FNPRM*, 11 FCC Rcd at 8988.

¹⁵ See 47 U.S.C. § 332(c)(3)(ii).

facilitate the achievement of this goal by ensuring that regulation creates positive incentives for efficient investment--rather than burdening entrepreneurial activities--and by establishing a stable, predictable regulatory environment that facilitates prudent business planning.¹⁶

The Commission's goals with respect to purely mobile services, as stated above, parallel its goals in this proceeding. It should not abandon existing sound policy simply because a portion of the services provided by CMRS licensees now may be fixed. The same regulatory structure should apply.¹⁷

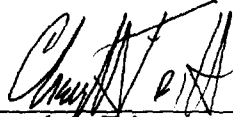
III. CONCLUSION

The approach described herein will encourage the pro-competitive, deregulatory policies envisioned by Congress and adopted by the Commission, while ensuring that both the states and the Commission adequately can fulfill their public interest duties to protect consumers from discriminatory or anti-competitive rates or conduct by CMRS providers. Therefore, Sprint PCS respectfully submits that the Commission should regulate fixed wireless services offered by CMRS providers in the same manner as all other CMRS services, subject to additional regulation only as provided under Section 332(c)(3) of the Act.

¹⁶ *Petition of the People of the State of California and the Public Utilities Commission of the State of California To Retain Regulatory Authority over Intrastate Cellular Service Rates*, 10 FCC Rcd 7486, 7496-7 (1995)(emphasis added citations omitted).

¹⁷ Without a showing that the public will be otherwise harmed, the Commission should not assume that because these services could ultimately resemble services offered by other types of carriers, that some level of further regulation is automatically justified. It is just this kind of "regulate first, ask questions later" regulatory structure that the Commission and Congress have both fought hard to dismantle.

Respectfully submitted,



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Dated: November 25, 1996

CERTIFICATE OF SERVICE

I, Kathryn M. Stasko, do hereby certify that the foregoing **COMMENTS OF SPRINT SPECTRUM L.P. d/b/a SPRINT PCS** was hand delivered on this 25th day of November, to the following:

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